

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\*\*\*\*\*

BANCO do BRASIL, S.A.,  
Plaintiff

vs.

Case No. 1:09-cv-11343-NMG

275 WASHINGTON STREET TRUST,  
Defendant

\*\*\*\*\*

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE JUDITH G. DEIN  
AT BOSTON, MASSACHUSETTS  
ON JUNE 28, 2011

APPEARANCES:

For the Plaintiff:

Arnold & Porter, LLP  
399 Park Avenue  
New York, New York 10022  
212-715-1000  
By Charles G. Berry, Esquire

Hinckley, Allen & Snyder, LLP  
28 State Street  
Boston, Massachusetts 02109  
617-345-9000  
By Eric F. Eisenberg, Esquire

For the Defendant:

Sugarman, Rogers, Barshak & Cohen, PC  
101 Merrimac Street, 9th Floor  
Boston, Massachusetts 02114  
617-227-3030  
By Paul E. White, Esquire and William F. Benson, Esquire

Transcriber: Karen M. Aveyard,  
Approved Federal Court Transcriber

-----

TRANSCRIPTION PLUS  
1334 ELM STREET  
LEOMINSTER, MASSACHUSETTS 01453  
(978) 466-9383  
[www.transcriptionplus.com](http://www.transcriptionplus.com)

## P R O C E E D I N G S

3 THE CLERK: The United States District Court for the  
4 District of Massachusetts is now in session on June 28, the  
5 year 2011, in the matter of Banco do Brasil versus 275  
6 Washington Street Trust, Civil Action No. 2009-11343.

7 Could counsel please identify themselves for the  
8 record.

9 MR. BERRY: Charles Berry, Arnold & Porter, pro hoc,  
10 for the plaintiff and the defendant on the counterclaim, Banco  
11 do Brasil.

12 MR. EISENBERG: Eric Eisenberg, Hinckley, Allen &  
13 Snyder for Banco do Brasil, your Honor.

14 MR. WHITE: Good afternoon, your Honor. Paul White  
15 from the law firm of Sugarman, Rogers, Barshak & Cohen.

16 MR. BENSON: And Bill Benson, Sugarman, Rogers,  
17 Barshak & Cohen, for the defendant.

18 THE COURT: Okay. So we're here on the defendant's  
19 motion to compel?

20 MR. WHITE: Yes, your Honor.

21 THE COURT: Go ahead. I'll hear you.

22 MR. WHITE: Your Honor, it is, I submit, a relatively  
23 simple motion, but let me start by telling you what is not at  
24 issue.

What is not at issue is what Banco do Brasil puts in

1       their opposition, and that is that the trust is somehow relying  
2       upon the advice of counsel; the fact that Attorney Scott  
3       advised her client in some way and has referenced those  
4       communications, or that the bank is relying on those  
5       communications. We don't say that at all.

6                 This is a motion that seeks to compel the production  
7       of attorney-client privileged communications and a limited  
8       group, because this is a motion that is based on a specific  
9       waiver of the attorney-client privilege, and that is the  
10       so-called at-issue waiver. And when an at-issue waiver takes  
11       place, the waiver that follows is limited to essentially the --  
12       rather the production that follows is limited to the scope of  
13       the waiver. So --

14                 THE COURT: And you're basing the waiver on the  
15       affidavit?

16                 MR. WHITE: So we base the waiver entirely on the  
17       affidavit of Attorney Scott, and my Brothers say in their  
18       papers that it's merely one or two isolated paragraphs. That's  
19       really not what happened here at all.

20                 The bank moved for summary judgment in this case and  
21       it relied upon the affidavit of Attorney Scott, and the two  
22       paragraphs that are the key paragraphs that we say give rise to  
23       the at-issue waiver are the last two paragraphs. And the  
24       entire other paragraphs in her affidavit build up to and form  
25       the basis for the statements that are in there.

1                   THE COURT: Well, that was my problem, I'll be honest  
2 with you. It seemed to me that in the first 27 paragraphs, 26  
3 paragraphs, she explains all of these meetings, all of these  
4 communications, which we all agree are not privileged, and that  
5 they've produced, I presume, the correspondence that's  
6 referenced therein, the applications that's referenced therein,  
7 the notes of the meeting that are referenced therein. I mean,  
8 so those are not the issue.

9                   So then you get to the end and it says, sort of in  
10 summary, we did a whole lot of work, and then it gives her  
11 opinion.

12                  Now, I don't know that her opinion matters at all. I  
13 don't know if you have expert opinions on whether somebody did  
14 due diligence or not. But, you know, we're not up to that.

15                  But why isn't she just a fact -- why isn't she just  
16 limited to the facts that she's described in her affidavit?

17                  MR. WHITE: Well, if she had done that, your Honor, it  
18 might have been a different matter, but she clearly didn't do  
19 just that. If she had stopped at that point, it might well  
20 have been a different matter.

21                  I'm not so sure that it would have been, but even if  
22 that were the case, the fact is that what she did is she -- and  
23 what the bank did is they presented to the Court in connection  
24 with an effort to win this case, they presented her the person  
25 with all of the knowledge, including the knowledge of the

1 dealings that she had with her own client, and said, "Look at  
2 what my client has done. My client did all of these wonderful  
3 things. You should find and conclude based upon what I am  
4 telling you, that, in fact, my client did everything that you  
5 could expect a client to do exercising good faith in trying to  
6 meet its burden to open a bank"; and the fact is that once you  
7 do that, once you let that cat out of the bag and rely upon a  
8 lawyer to make those sorts of representations, and it is  
9 fairness that it is absolutely at the root of the doctrine  
10 of --

11 (There was a break in the audio.)

12 | MR. WHITE: -- waiver, of at-issue waiver.

Fairness dictates that the other side be given an opportunity to rebut those statements, and in the circumstances of a communication like this of assertions like this by a lawyer, what that must mean is to determine and investigate and do discovery on what the communications were between the lawyer and the client, because in putting this lawyer forward at this point, that lawyer is speaking for the client; and what the cases say is that if you use an attorney's statements like this as a sword -- this is absolutely a sword -- you cannot then rely upon the attorney-client privilege as a shield to prevent the other side from being able to challenge those assertions and do that necessary discovery to say that isn't the whole story.

1           And, your Honor, there is a case which is absolutely,  
2 I think, on point with this case that --

3           THE COURT: But just so I understand, I mean, we have  
4 30 paragraphs that give you facts, that just give facts of the  
5 meetings that she's had, of the communications that she's had,  
6 of the preparations that she did, that her client did, to get  
7 this application.

8           Now, you haven't deposed her yet, right?

9           MR. WHITE: We don't want to until we get a ruling on  
10 this, your Honor.

11          THE COURT: And then it seems to me, and maybe I  
12 misread it, but the summary is then I worked for the 18 months  
13 that she's now described to get the regulatory approvals, and  
14 this is the work that she did.

15          I don't see anything -- I mean, I have to tell you, I  
16 understand that you've argued this with passion, I just am so  
17 not seeing where the waiver is that I'm a little surprised.

18          MR. WHITE: It's in Paragraph 32, your Honor. And so  
19 you've read --

20          THE COURT: In my opinion --

21          MR. WHITE: In my opinion --

22          THE COURT: So you strike her opinion.

23          MR. WHITE: Banco do Brasil made every reasonable  
24 effort in diligently working to obtain the required regulatory  
25 approvals in order to open the FSB, and the only way that she

1 can say that, and the basis for that statement, is her work  
2 with the client, including all of her communications with the  
3 client.

4 And let me, if I may, your Honor, explain what are the  
5 types of things that we have questions about --

6 THE COURT: Okay.

7 MR. WHITE: -- because we have some very serious  
8 questions in this case.

9 The history that she relates is the following, and so  
10 it's not just these two paragraphs. You do have to look at the  
11 history. The history that she relates is, and I'm not going to  
12 go through every single paragraph, we don't need to do that,  
13 but it is essentially as follows: In March 2008, the bank  
14 began the approval process. She was retained as counsel and  
15 she was the lawyer working with the bank to do that. On  
16 October 1st, 2008, approximately six months later, the bank  
17 withdrew its application.

18 On January 6th, 2009, the bank filed a new application  
19 with a revised business plan, and on March 26th, 2009, the  
20 FDIC, in a conference call that she participated in, said that  
21 it was returning the application and expressed concerns about  
22 the business plan. Those are the facts.

23 And then we have those last two paragraphs, Paragraphs  
24 31 and 32. The bank never submitted a new business plan. Why  
25 not?

1               Now, this is the lawyer who was working with them  
2 and --

3               THE COURT: Well, why do you get the attorney-client  
4 communication for that fact?

5               Why don't you take the deposition of the person from  
6 the bank who is responsible and you say to him, "Why didn't you  
7 submit a new application?"

8               I mean, you're asking for attorney-client privileged  
9 documents.

10               Now, you may have an argument -- what I don't know is  
11 whether all of these documents are actually privileged, and at  
12 what extent. You know, is it just business advice and -- you  
13 know, that's a whole other thing. But that's not what the  
14 motion is that you have in front of me.

15               The motion that you have in front of me is one that  
16 says that these are the strategies, the thought processes, the  
17 legal advice that the client gave without even knowing -- I  
18 mean, it seems to me that the businessman is going to say -- if  
19 the businessman says to you, "I relied on my advice of  
20 counsel," you've got a different situation. If he says we  
21 didn't do it because the FDIC wanted funding of XY and Z and we  
22 were not prepared to do it, or whatever reason he gives, then  
23 you have a fact that excludes the attorney's thought process.

24               MR. WHITE: Your Honor, they didn't submit an  
25 affidavit from the business person, they submitted an affidavit

1 from the lawyer; and the lawyer is the person who, throughout  
2 this process, was representing them and most knowledgeable  
3 about it, and that, I submit, is the reason why we have an  
4 affidavit from that person. And I submit that what the cases  
5 really say is if you choose to use that person --

6 (There was a break in the audio.)

7 MR. WHITE: -- if you choose to use a lawyer, and  
8 that's what the McLaughlin case says, even if you dress it up  
9 with objective facts, once you do that you have used your  
10 attorney as a sword and you cannot use the attorney-client  
11 privilege as a shield. You cannot from the moment you do that.

12 They had a choice, your Honor. They could have done  
13 exactly what you are suggesting. They could have had that  
14 businessperson, or whoever those businesspersons were, and they  
15 could have said, "We submitted this application. We had phone  
16 calls with the FDIC. This is what the FDIC did. This is what  
17 we decided to do."

18 That categorically and completely is not what they  
19 have done. They have submitted an affidavit from their  
20 attorney with that attorney's opinion about their good faith  
21 and how they progressed, and the case law says if you do that  
22 you have opened that can of worms.

23 Your Honor, I would ask that the Court read the  
24 McLaughlin case which we cite, and the McLaughlin case is a  
25 very similar fact pattern to this, and that case was an

1 employment case in which the Secretary of Labor, I believe it  
2 said, a case out of the Northern District of Illinois, the  
3 Secretary of Labor had filed suit against some clients of an  
4 attorney suggesting they had violated some fair labor standard  
5 act and some provisions of that act, and the attorney submitted  
6 an affidavit saying, "I had discussions with the Secretary of  
7 Labor's offices and these are the representations that they  
8 made, which caused my client to legitimately rely on them."

9 And the Department then filed a notice of deposition  
10 of the attorney with some requests for documents, which were  
11 resisted, and that's what gave rise to the motion which led to  
12 the decision in the McLaughlin case. And what the Court said  
13 was, firstly, that the attorney and the attorney's client made  
14 exactly the argument that is being made by the bank here, which  
15 is we didn't rely upon any communications between the client  
16 and the -- we just relied upon the objective facts of what  
17 happened between the Department of Labor, and actually the  
18 Department of Labor's representations, and me, and the Court  
19 said, "No way, you can't do that," because you cannot put that  
20 matter at issue when in fairness what the Department would then  
21 want to do is depose your client and ask you questions about  
22 what you said to your client.

23 And the court said the following, and it relied upon a  
24 decision in another case, the Southwire against Essex case, in  
25 which Essex had talked about the fact that the affidavit of

1       their lawyer was limited solely to these objective facts, and  
2       the court said, "Even were we to view Essex's objective  
3       evidence as entitling it to an inference or *prima facie* showing  
4       of reliance, fairness dictates that Southwire, the plaintiff,  
5       be permitted to rebut the showing.

6                  The supposed objective subjective dichotomy is, in a  
7       way, illusory. Essex's objective evidence, which may include  
8       proof of delay, unfulfilled threats or suits and the like, is  
9       merely evidence which permits a trier of fact to infer that  
10      Essex actually relied on those factors.

11                 In short, Essex assert that it relied on Southwire's  
12      delay in building the four plans. Southwire says that Essex  
13      relied on something else," and this is the important one.  
14      "What Essex is arguing here is that Southwire is not entitled  
15      to prove what Essex actually relied on, even though the court  
16      should be entitled to infer actual reliance from Essex's own  
17      proof. The unfairness of Essex's position is manifest."

18                 That's exactly what's happening here. The bank says,  
19      "We're entitled to put Attorney Scott forward, and the Court  
20      should read that affidavit," which I'm sure the court did at  
21      the motion for summary judgment stage, "and believe it." But  
22      Mr. White is not entitled to now seek to rebut the allegations  
23      that are in that affidavit, but asking about what were the  
24      communications with your client.

25                 Did you say to your client when the FDIC returned that

1 application, "You need to get a move on and file something  
2 again"? Did the client say to Attorney Scott, "We've decided  
3 we don't want to move forward anymore"? You know, those are  
4 the sorts of issues that we say are absolutely at issue in this  
5 case, your Honor, and they are being concealed by an affidavit  
6 that simply recites objective evidence, and that's what this is  
7 about.

8 THE COURT: Why isn't your issue whether or not they  
9 decided to go forward because they wanted to or not?

10 Isn't the trial going to be on this point, what the  
11 FDIC required?

12 Either you'll rely on her factually or you'll have  
13 your own expert on the permitting --

14 (There was a break in the audio.)

15 THE COURT: -- process. But you will have a body of  
16 facts that says the -- this was what was provided to the FDIC.  
17 The FDIC will say this is sufficient or insufficient, and  
18 they've either done it in writing or they've done it orally,  
19 all of which is subject to discovery, and then somebody, the  
20 fact finder, has to determine whether that's in breach of the  
21 contract to exercise due diligence in doing it.

22 I mean, why is -- let's assume that the client said,  
23 "I hate the FDIC. I don't want to file another piece of paper.  
24 I've had it with them. I am done." So what --

25 MR. WHITE: Well, it wouldn't be that, your Honor, it

1       would be, "I've changed my mind. I don't want to open a bank  
2       anymore."

3                 THE COURT: But as long as the FDIC -- let's even  
4       assume that they say that. If the facts are that they've  
5       provided the FDIC with everything that the FDIC asked for, or  
6       the decision is not to provide the FDIC with whatever the FDIC  
7       wants, don't you ultimately have the fact finder decide whether  
8       that's enough or not?

9                 Somebody's subjective state of mind is not the  
10      criteria here.

11                MR. WHITE: Well, your Honor, everything that you've  
12      just said is absolutely true up to a point, and that is that  
13      that would be one way of doing this. That is one way of doing  
14      it. You could do it that way. My client doesn't have to do it  
15      that way. I don't have to try the case that way.

16               The other way of trying the case is to say here's a  
17      sophisticated bank represented by a sophisticated lawyer. They  
18      submit applications to the FDIC which are not sufficient. The  
19      FDIC returns the applications and no further application is  
20      filed.

21               Now, why would that be? Why is no further application  
22      filed when you have a sophisticated bank that presumably knows  
23      how to do this, and you have a sophisticated lawyer and law  
24      firm that presumably knows how to advise a client as to how to  
25      do it, and I'm entitled to ask a question to the person who is

1 at the heart of this whole problem, that's Attorney Kathleen  
2 Scott, and say, "Isn't it true that your client said to you,  
3 'We don't want to move forward with this anymore?'"

4 I'm entitled in these situations to ask those  
5 questions. They've opened the door to it. I would actually  
6 get an adverse inference if they refused to answer that  
7 question at trial, I believe, your Honor, but what I'm --

8 THE COURT: No. Wouldn't you get an adverse -- if she  
9 says -- you can say to her, "Why didn't you file anything  
10 else?" She can answer that.

11 Why does that give you the attorney -- I mean, she's  
12 the spokesperson. Somebody conveys something to the FDIC on  
13 why we're not continuing.

14 Isn't she the one that does that?

15 MR. WHITE: Your Honor, that's true. Let me answer  
16 your question.

17 Firstly, that's true, but what goes to the heart of  
18 any analysis, of any examination of whether a party was acting  
19 in good faith, is what was in their mind. Sure they can put  
20 applications together, but what matters when we are examining  
21 whether or not a good faith effort was being made is what was  
22 in their mind. It's not just what did they do, it's what were  
23 they thinking.

24 Now, we say --

25 THE COURT: But you haven't even asked the client what

1       they were thinking.

2                 I mean, disclosure of attorney-client, I have to tell  
3 you, I take pretty seriously, all right.

4                 MR. WHITE: Your Honor, I do --

5                 THE COURT: So you haven't even asked them.

6                 MR. WHITE: I do too. I do too. But that's the  
7 evidence that they have put before the Court on the summary  
8 judgment record. They put before the Court the opinion of an  
9 attorney that opens that door, and that, I respectfully  
10 suggest, is what the cases say.

11                 But, your Honor, I have the impression that I am not  
12 convincing you, and I believe I've said --

13                 THE COURT: But I'm going to read the cases.

14                 MR. WHITE: Your Honor, I believe I've said everything  
15 that I can say and I don't want to take any more time of the  
16 Court.

17                 THE COURT: No, I appreciate that.

18                 Let me hear from counsel briefly.

19                 MR. BERRY: Your Honor, I think very simply the  
20 at-issue doctrine does not apply here because nothing in  
21 Ms. Scott's affidavit puts at issue any attorney-client  
22 communication. The doctrine that you can't use the  
23 attorney-client privilege as a sword and then claim to use it  
24 as a shield simply doesn't apply here, because there is no  
25 attorney-client privilege whatsoever that is disclosed.

1                   Mr. White, although initially he pointed to five  
2 particular paragraphs, then he seemed to point to two, and then  
3 at the end he said it all comes down to the one paragraph where  
4 in a summary statement in her affidavit, Ms. Scott stated that  
5 in her opinion the bank, you know, proceeded diligently.

6                   She was the person who was charged with interfacing  
7 with the regulatory authorities, and the proof of the bank's  
8 due diligence and --

9                   (There was a break in the audio.)

10                  MR. BERRY: -- efforts, in terms of trying to obtain  
11 regulatory approval, is in those communications. We have  
12 produced 90,000 pages of documents, all of the communications  
13 now which were not on the record in the prior summary judgment  
14 motion, and Ms. Scott is available --

15                  THE COURT: I have more of a question. I mean, I  
16 think, seriously, the more complicated question is in what role  
17 was she participating, you know, how much of this was an  
18 attorney's role and how much of this was a business role.

19                  MR. BERRY: As the --

20                  THE COURT: But I think that's going to --

21                  MR. BERRY: She was the regulatory attorney, your  
22 Honor, and that is really not a business role. It's purely an  
23 attorney's role, and she was the advocate for the bank in its  
24 regulatory applications, and we have produced all of her  
25 communications with the regulatory authorities: The FDIC, the

1 OTS and the Federal Reserve Bank.

2 We have also gone to great trouble and expense to  
3 segregate out all of the attorney-client privileged documents.  
4 There are some 16,000 documents that we have identified.

5 And I think the other point that Mr. White  
6 scrupulously avoided discussing is the untimeliness of his  
7 motion. This affidavit of Ms. Scott was filed on October 30,  
8 2009. There wasn't any suggestion in the briefing on the  
9 summary judgment motion that by filing that the door was open  
10 to -- that it constituted a waiver of the attorney-client  
11 privilege, and it's been eight months since your Honor ruled on  
12 the summary judgment motion. And October 1st they served their  
13 document request. They knew that we would be going through the  
14 effort of segregating out privileged documents.

15 It was only a week or so before Mr. White made his  
16 appearance in this matter that they raised for the very first  
17 time in a letter of April 29th, 2011, that there was any  
18 possibility of waiver of attorney-client privilege. If there's  
19 any waiver in this overall situation, I would say it's their  
20 waiver of any claim of waiver. They simply cannot wait so long  
21 to do that.

22 We cited in our brief the Akamai decision from  
23 California which has a remarkably apt statement of exactly the  
24 kind of situation we're dealing with here. The court there  
25 said if Akamai thought that it had such a waiver in-hand, it is

1       much more likely that they would have asserted it promptly.  
2       That delay alone suggests that Mr. Benson did not think in  
3       April that the privilege was waived. The period of time they  
4       were talking about there was eight months; here we're talking  
5       about 19 months since Ms. Scott's affidavit.

6                  THE COURT: Do you know this McLaughlin case?

7                  MR. BERRY: Excuse me?

8                  THE COURT: Do you know the McLaughlin case?

9                  MR. BERRY: Yes, I do, and I wanted to address that as  
10       well because Mr. White has placed such emphasis on it.

11                 That is a distinguishable case because the party that  
12       was asserting the privilege there had put in issue the advice  
13       of its counsel. It entailed an assessment of what the  
14       standards are of the Department of Labor under the Fair Labor  
15       Standards Act; and it wasn't simply a question of the party  
16       that claimed the privilege asserting good faith reliance on the  
17       Department of Labor's interpretation, but the attorney's advice  
18       with respect to that interpretation had been put at issue, and  
19       that was the basis for the court's decision there.

20                 So it's utterly distinguishable because of the  
21       proactive assertion of a privileged communication, the advice  
22       there that the lawyer gave to the client about the meaning and  
23       interpretation of the Department of Labor's standards. So all  
24       the cases that they discuss involve some affirmative act of  
25       that kind.

1           I'm glad to hear that Mr. White has conceded that we  
2 have not put at issue the advice of counsel. A good number of  
3 the cases that they cited in their brief depend on that. It's  
4 usually in a pleading or in a discovery response or something.  
5 It could be an answer to a deposition question, as your Honor  
6 posited, that somebody could put in issue the advice of  
7 counsel. We don't have --

8           (There was a break in the audio.)

9           MR. BERRY: -- any of that here. Ms. Scott is  
10 available to testify. They can ask her what the basis of  
11 anything in her affidavit is, but they cannot ask her about  
12 privileged communications when the bank has not put at issue  
13 any of those.

14           So we're eager to have the full record developed. I'm  
15 sure that the landlord's counsel here, having now spent some  
16 time looking at the papers that we have produced, have a full  
17 understanding of the enormous effort that the bank put into  
18 getting the regulatory approval here.

19           THE COURT: Can I ask you about -- and maybe I'm  
20 opening a can of worms, but if I understand it, there's a  
21 contention that you've translated some documents and they don't  
22 have the translations.

23           Is there a way to produce these?

24           MR. BERRY: We have not translated documents, your  
25 Honor. We have reviewed with the aid of Portuguese speakers

1 documents prior to production, but it's not like we have some  
2 list of documents, which they misunderstand and we've already  
3 told them about that, and they can hardly be surprised when  
4 they serve an enormously broad document request on a Brazilian  
5 bank that a lot of the documents, the internal documents from  
6 head office -- this was a huge project that was managed at the  
7 very highest levels of the bank and required approvals at the  
8 various highest levels -- have documents in Portuguese. That's  
9 their responsibility. There's absolutely no obligation on our  
10 part to translate them for them or for ourselves, and, you  
11 know --

12 THE COURT: I mean, they have copies?

13 I assume some of the operative documents, at least,  
14 have been translated.

15 MR. BERRY: We have rough translations of selected  
16 documents, but to, you know, produce those rough translations  
17 on selected documents would be effectively handing over work  
18 product.

19 It's not for us to guide them. I'm frankly eager to  
20 get some of these documents on the record so they can show that  
21 the bank consistently made every effort to obtain this retail  
22 bank approval and federal savings bank approvals, and they will  
23 be disappointed to find that that never changed. But --

24 THE COURT: Well, let me just throw out as a  
25 suggestion that you may or may not want to take. I have

1 nothing before me, but you don't want to end up in trial with a  
2 contest over the accuracy or sufficiency of translations.

3 So to the extent that you can cooperate on that and  
4 cost share or whatever you're going to do, let me strongly  
5 suggest that that might be an approach, at least for some  
6 identifiable set of documents that you all are going to want,  
7 because I have been through the trial where we've spent months  
8 figuring out which translation is accurate, and it's expensive  
9 and unproductive time.

10 MR. BERRY: Right.

11 No, I agree with that, your Honor, and I'm certainly  
12 happy to consider some arrangement that we can make with the  
13 landlord's counsel. We do very much anticipate renewing the  
14 summary judgment motion at the completion of discovery, and I  
15 would assume that part of that would be to submit documents,  
16 the originals of which are in Portuguese. And, you know, those  
17 are required, as I understand the rules, to be officially  
18 translated, not just informally as we have, and that's a very  
19 considerable expense.

20 So if there's some way that we can, you know, share  
21 that, we're certainly happy to entertain that.

22 THE COURT: Just a suggestion. I mean, the Court  
23 will -- my guess -- it's not my case, right?

24 It's just been referred to me for this. So I can't  
25 speak for Judge Gorton's session, but I would accept

1 agreed-upon translations -- let me put it that way -- whether  
2 they were official or not.

3 MR. BERRY: Yes.

4 THE COURT: If they're agreed-upon, I don't really  
5 care.

6 MR. BERRY: Right.

7 THE COURT: It's when you have a contest that's a  
8 problem.

9 MR. BERRY: No. I think that would be an orderly and  
10 efficient way to proceed.

11 THE COURT: All right.

12 MR. BERRY: Well, unless your Honor has any further  
13 questions, I would just respectfully submit that --

14 THE COURT: Let me just --

15 MR. BERRY: -- their motion be dismissed in its  
16 entirety.

17 THE COURT: Let me just ask you to address the  
18 timeliness and then anything else that you'd like to respond  
19 to.

20 MR. WHITE: Yes, your Honor.

21 Firstly, my understanding of a waiver is that it means  
22 what it says. If you've waived a privilege and that waiver  
23 happened at the introduction of Attorney Scott's affidavit, and  
24 I was not involved in the case at that time, so I can't speak  
25 to --

1 | (There was a break in the audio.)

2 MR. WHITE: -- what the thought processes were, but  
3 I'm sure it was a very busy time for counsel for the landlord  
4 at that time. But if there was a waiver, the waiver happened  
5 there and then. You know, the milk doesn't go back into the  
6 bottle just because counsel for the other party doesn't raise  
7 it immediately, so I think that's the answer to that.

I just want to make two very brief points. One is  
Attorney Berry said that the bank and -- I'm sorry, the  
landlord can ask Attorney Scott anything they want about the  
basis for opinion. Well, the point is we can't. This is  
somebody who is giving an opinion based upon her dealings with  
her client, and you can bet that when I say "Is part of the  
basis of your opinion that you dealt with the client and you  
spoke and you got instructions, and what did they say," there  
is going to be an objection on the grounds of privilege. So  
that's simply not true.

18                   And the second thing is, your Honor, as you have noted  
19 just by your last question here, there is a -- and it's the  
20 second limb of the test that we put forward, which is the  
21 information available in a reasonable way from any other source  
22 and it clearly isn't. We're talking about 100,000 documents,  
23 many of which are in Portuguese, and what instead we are  
24 seeking to do is ask for a very limited investigation, which  
25 will enable the truth to come out, of what it was that was

1       actually done by an American lawyer to an American regulatory  
2 agency.

3               So I do think that there's a very significant fairness  
4 issue that is raised by this motion, and I greatly appreciate  
5 the Court's time this afternoon, and your willingness to read  
6 the McLaughlin case and see what it says and the cases cited in  
7 it on that issue.

8               THE COURT: I will take the matter under advisement.  
9 I will look at the cases. I am obviously inclined to deny the  
10 motion, but if it is denied, it would be without prejudice.

11               So I have a vision of what this deposition is going to  
12 look like. I could be wrong. I mean, she could claim  
13 privilege on a whole lot of things that maybe put a waiver into  
14 consideration. You know, I don't know. So if I do deny the  
15 motion, it will be without prejudice.

16               MR. WHITE: May I raise one separate issue which  
17 Attorney Berry and I have not spoken about, but is always of  
18 concern to me when I'm in Federal Court in front of a  
19 magistrate judge who becomes very familiar with the case, and  
20 I'm sure that that has already happened, given that you  
21 rendered that decision, your Honor.

22               THE COURT: I remember it well.

23               MR. WHITE: Yes.

24               If counsel in the case discussed and decided that it  
25 made sense for the parties to ask that the case be referred to

1 you for trial, is there a procedure that we should follow to do  
2 that?

3 THE COURT: All you need to do is tell Mr. Quinn, and  
4 there's a filing that goes on that -- or if all parties  
5 consent. You know, obviously I would be happy to take the  
6 case, but it's up to you.

7 MR. WHITE: Yes.

8 THE COURT: And --

9 MR. WHITE: Understood, your Honor.

10 THE COURT: And the other thing, let me advise you, if  
11 you do summary judgment motions as well, I mean, I would -- you  
12 know, we're here and we try a lot of cases, but if you file  
13 dispositive motions, you also have the option of consenting  
14 just for that motion, if that makes sense, just to avoid the,  
15 you know, objection period and you live with whatever that  
16 decision is.

17 MR. WHITE: Yes, your Honor.

18 THE COURT: I leave it to you, but just let Mr. Quinn  
19 know.

20 MR. WHITE: Thank you very much, your Honor.

21 THE COURT: Okay?

22 MR. EISENBERG: Thank you, your Honor.

23 THE COURT: Thank you.

24 MR. BERRY: Thank you, your Honor.

25

1 (The hearing was concluded.)  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Karen M. Aveyard, Approved Federal Court Transcriber, do hereby certify that the foregoing transcript, consisting of 26 pages, is a correct transcript prepared to the best of my skill, knowledge and ability from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Karen M. Aveyard

Karen M. Aveyard

August 5, 2011

Date